

The Honorable Patrick Oishi
Noted for Hearing: June 21, 2019, 10:00 a.m.
With Oral Argument
Reply Papers

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

1426 FIRST AVENUE LLC,

Plaintiff,

No. 18-2-21872-1 SEA

v.

CITY OF SEATTLE,

Defendant.

**PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PARTIAL
SUMMARY JUDGMENT**

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I. INTRODUCTION

The City Council intentionally took action against just one property and thwarted the owner's contract to sell the property to a redeveloper for \$41 million by placing control of the property into the hands of the Historical District Commission. The City's action is so offensive to core principles of federal and Washington law that it is not surprising that several overlapping claims give the owner legal relief.

Unchecked majority power can trample minority rights. This is a "tyranny of the majority." 3 John Adams, *A Defence of the Constitutions of Government of the United States of America*, 291 (London 1788). To avoid this peril, the Washington and Federal Constitutions provide protections for individual liberties. Among them is that government cannot steamroll individual rights, even if elected representatives believe it is what the majority wants. The Fourteenth Amendment is such a protection: "nor shall any State deprive any person of life, liberty, *or property*, without due process of law." U.S. Const. amend. XIV (emphasis added). *See also* Wash. Const. art. 1, § 3. The provisions also highlight the need to protect "any person." And when one person is targeted, equal protection guarantees bolster due process rights. Both doctrines underpin why spot zoning, as occurred here, is illegal. Majoritarian groups, neighborhoods, city-wide populations can protect themselves at the ballot box, but when the government comes after *one person*, in isolation, the ballot box does not work. Resort must be made to the courts and the rule of law.

II. ARGUMENT

A. Procedural Due Process.

Plaintiff set out in its Opposition to the City's cross-motion the reasons why the after-the-fact hearing, even if that was the only hearing needed, fails to live up to Constitutional guarantees. Dkt. 68, "Pl. Opp'n" at 7-10. And Plaintiff also set out the details for why the action was quasi-judicial, was a rezone, or independently the application of an overlay, all of

1 which meant that advance notice and meaningful hearings before enactment were supposed to
2 have happened. *Id.* at 5, 7-8.

3 In summary, the action was a rezone because the ordinance replaced the DMC zoning
4 with PMM zoning. *See* SMC 23.34.122 and 23.49.336 *et seq.* As used in both
5 SMC 23.84A.032 – “R” and *Cathcart-Maltby-Clearview Community Council v. Snohomish*
6 *County*, 96 Wn.2d 201, 212, 634 P.2d 853 (1981), this was a rezone because it changed the
7 “zoning classification.”

8 Moreover, there was a request for a rezone: It came from Councilmember Sawant (or
9 the Council as a whole). “This is CM Sawant’s proposal to adjust the boundaries ...
10 specifically for the purposes of ‘killing’ the Omni [sic] Development potential development.”
11 Dkt. 52, “Tondini MPSJ Decl.,” Ex. 22 at 2. *See also id.*, Exs. 20-21. A Council’s
12 “application” for a rezone was precisely the situation in *Schnitzer West, LLC v. City of*
13 *Puyallup*, 190 Wn.2d 568, 577-78, 416 P.3d 1172 (2018) (holding that the City of Puyallup
14 was the party requesting the rezone at issue there). *See also*, Tondini Reply Decl., Ex. 60
15 Washington’s Municipal Research and Service Center’s (MRSC) bulletin on *Schnitzer*. As in
16 *Schnitzer*, the City’s act was a rezone, an overlay application, and was quasi-judicial.

17 Next, the City argues that adding the property to the Historic District was not applying
18 an overlay. However, the City hides from the Court that SMC 23.49, which is conveniently
19 titled, “**Downtown Overlay Maps**,” sets out the Pike Place Market including the Historic
20 District *as an overlay* in Map 1K. SMC 23.49 is appended hereto. Thus, the City is simply
21 flat wrong to argue the District is not an “overlay” as used in zoning law. Its own witness
22 explained the term. Tondini MPSJ Decl., Ex. 6 (Staley Dep.) at 21-22, 105-106, and Ex. 43.
23 And, the City cites no case to counter the definition in *Jachimek v. Superior Court*, 169 Ariz.
24 317, 319, 819 P.2d 487 (1991). Independent of any rezone, applying an overlay, is a Type IV
25 quasi-judicial decision. SMC 23.76.036(A)(1).
26

1 Overarching above all the particulars of the SMC, or even RCW 36.70A.390, the
2 Constitution requires “the opportunity to be heard at a meaningful time and in a meaningful
3 manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted).
4 The City failed to provide due process.

5 **B. Substantive Due Process.**

6 The City’s argument for why decades of Washington cases like *Presbytery of Seattle*
7 *v. King County*, 114 Wn.2d 320, 330, 787 P.2d 907 (1990), should be overturned were
8 addressed in the Plaintiff’s Opposition to the City’s motion. Pl. Opp’n at 10-15. The *stare*
9 *decisis* reality is that *Presbytery* is still the law and can only be disregarded if ever the
10 Washington Supreme Court overrules it. Where the Supreme Court has expressed “a clear
11 rule of law,” it will not “overrule it *sub silentio*.” *Lunsford v. Saberhagen Holdings, Inc.*, 166
12 Wn.2d 264, 280, 208 P.3d 1092 (2009).

13 The City attempts to deny there was any undue oppression. However, a similar
14 circumstance arose in, and the U.S. Supreme Court found a 14th Amendment violation in,
15 *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928), where the loss of a potential
16 \$63,000 property sale was caused by a zoning ordinance. The lost sale was a “serious and
17 highly injurious” loss. *Id.* at 187-89. The City cites *Nectow* as a genesis for substantive due
18 process property law. Dkt. 58, “2019 City Mot.” at 17. Washington’s balancing public need
19 with oppression has its foundation in *Nectow*. And the consideration of “reasonableness” (aka
20 “oppression”) is still part of federal law. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542
21 (2005) confirmed: “the Due Process Clause is intended, in part, to protect the individual
22 against ‘the exercise of power without any reasonable justification in the service of a
23 legitimate governmental objective.’” (citing *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846,
24 (1998)).

25 Here there was a lost sale, as in *Nectow*, but for \$41 million and caused by the
26 Ordinance. Dkt. 55, “R. Forbes Decl.” ¶¶ 5 & 11; R. Watson Decl. ¶¶ 2-4. That amount also

1 far outstrips the amount at issue in *Sintra and Robinson* which voided the laws at issue.
2 *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 21-24, 829 P.2d 765 (1992); *Robinson v. City of*
3 *Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992).

4 The Ordinance also placed redevelopment control into the hands of the Commission
5 and the District rule is that alteration of historic buildings is prohibited. Tondini MPSJ Decl.,
6 Ex. 33, “Guidelines” 3.2.13 and 3.2.6. And even where redevelopment is allowed, the
7 Commission requires anything redeveloped to be in “scale,” which is at most six to eight
8 stories. *Id.* at 3.2.2; R. Forbes Decl. ¶ 11.

9 Further, Plaintiff did propose two less injurious solutions: (i) the proposal to build a
10 performance venue into a redeveloped building; and (ii) that the City should simply buy the
11 property. Dkt. 51, Pl. Mot. at 6, 8, 16, 21.

12 The City next argues the violation of the Constitution might only be temporary
13 (although scheduled now to last at a minimum until 2020). However, any violation of a
14 constitutionally protected right creates an actionable injury at the moment it first happens.
15 *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 964-65, 954 P.2d 250 (1998).

16 **C. Equal Protection.**

17 Plaintiff explained why the City’s equal protection defenses should not prevail in
18 opposing the City’s cross-motion. Pl. Opp’n at 13-16. Incredibly, the City argues that
19 Plaintiff was not treated differently than others similarly situated either on First Avenue or as
20 a music venue. Dkt. 66, “City Opp’n” at 22:6-8. Reality and common sense is true enough
21 guide. Intent matters (*id.*) and the City targeted this site and sale. None of the other buildings
22 across from the Market were covered by the Ordinance, including some that were already
23 Landmarked. Tondini MPSJ Decl., Ex. 36. There is nothing unique about the site because
24 other buildings are across the street, other halls have performance histories, and other
25 buildings were connected to the Market and are being redeveloped, such as the Hahn building.
26

1 Dkt. 54, “E. Forbes Decl.” ¶¶ 4-5, Exs. A-B; Dkt. 69, “2019 Tondini Opp’n Decl.,” Exs. 54-
2 57.

3 As for why it treated Plaintiff differently than the other properties added to the
4 Historic District in the 1970s by not offering to purchase the site for fair value, all that the
5 City can say is: that was then and this is now. City Opp’n at 22:16-22. No case exists for that
6 excuse and it would eviscerate the Constitutional guarantee.

7 The original Ordinance for the District calls “for the acquisition” and “public
8 ownership” of Market properties. Dkt. 65, “Mitchell Decl.,” Ex. 11 § 3. *See also* 2019
9 Tondini Opp’n Decl., Ex. 49 at 6 (“Urban Renewal Techniques ... 1. Acquisition of real
10 property”) and at 35 (Acquisition Map).

11 When adding the park to the District in 1986, it was already (i) a city-owned park, and
12 (ii) in the Market urban renewal area. When adding the PC-1 area to the District in 1989, it
13 was (i) owned by the Market PDA (public entity), and (ii) already in the Market urban
14 renewal area. *Id.*, Ex. 49 at 34-35; Tondini Reply Decl., Ex. 61-62. Neither was privately
15 owned or outside the urban renewal area, which is the case here. The City cites to nothing
16 outside the renewal area that has ever been added to the District.

17 **D. Spot Zoning.**

18 Why the City is wrong about spot zoning was explained in opposing the City’s cross-
19 motion. Pl. Opp’n at 19-21. In summary, either a rezone *or* placing a property in “a district”
20 is “spot zoning.” Either is impermissible and void. *Pierce v. King Cnty.*, 62 Wn.2d 324, 338,
21 382 P.2d 628 (1963). “[I]f a court labels a rezoning ‘spot zoning,’ the next words in the
22 opinion will be ‘and void.’” *See* 17 William B. Stoebuck & John W. Weaver, *Washington*
23 *Practice: Real Estate: Property Law* § 4.18 (2d ed. 2019).

24 In 2006 and in 2017, the City incentivized and anticipated the high-rise redevelopment
25 for residential use of swaths of downtown including this precise site. Tondini MPSJ Decl.,
26 Ex. 6 (Staley Dep.) at 60-63, 69-70, 72-77, 98-100, Exs. 10-15. Even though nothing had

1 changed in the physical environment for the site, or for the Market, but based only on poster-
2 waiving and a desire to “kill” this one project, the City rezoned this single site *and* moved it
3 into “a district.” That is textbook spot zoning, twice-over.

4 **III. CONCLUSION**

5 Voiding the Ordinance now will stop the Constitutional violations and, hopefully,
6 allow for a limit on damages and attorneys’ fees.

7 DATED this 17th day of June, 2019.

8 BYRNES KELLER CROMWELL LLP

9
10 By /s/ John A. Tondini

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19 **CERTIFICATION:** The above signature also certifies that this memorandum
20 contains 1,746 words, in compliance with the Local Civil Rules.

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 17th day of June, 2019, a true copy of the foregoing was served on each and every attorney of record herein via King County E-Service:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

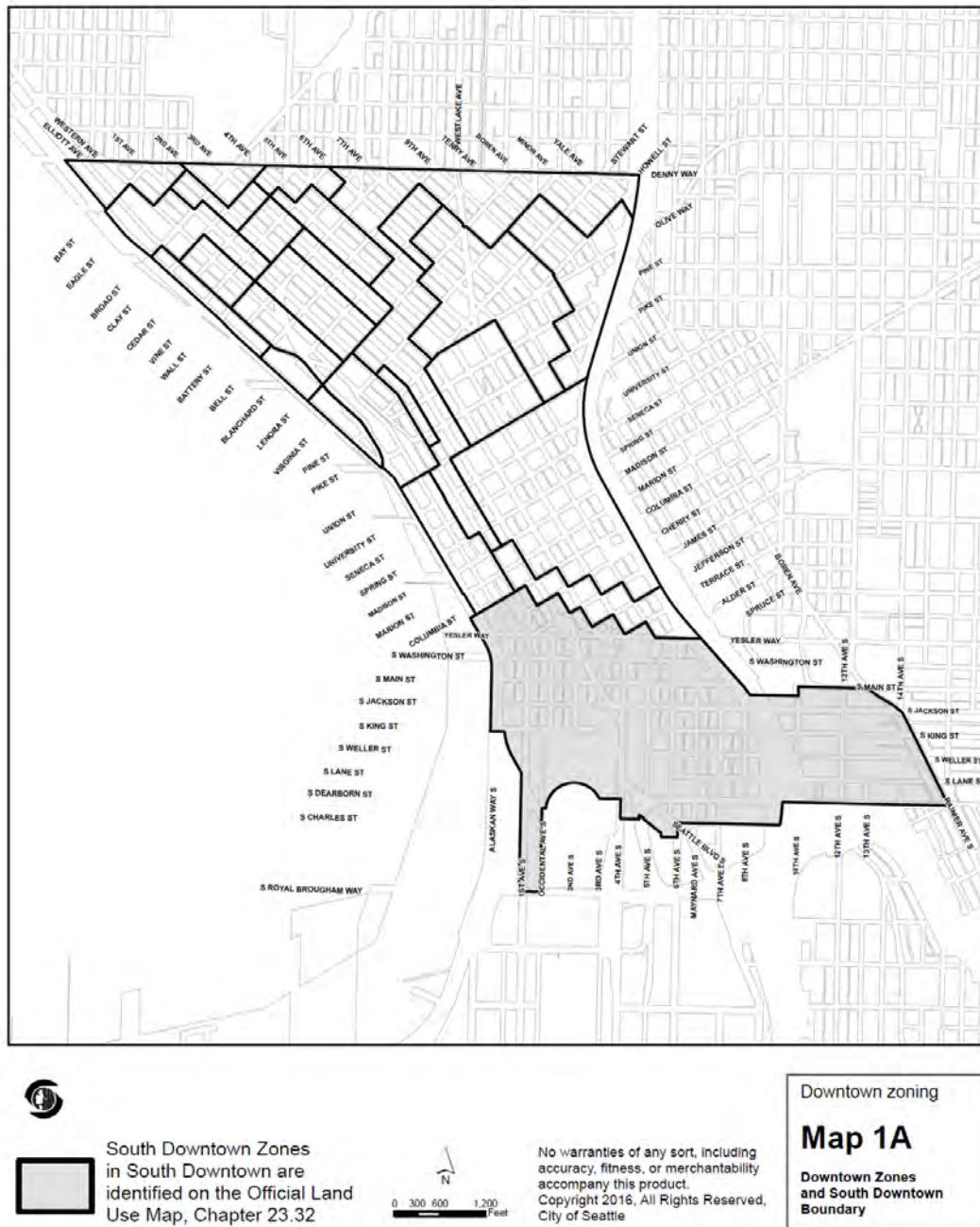
DATED in Seattle, Washington, this 17th day of June, 2019.

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Appendix of Seattle Municipal Code Section

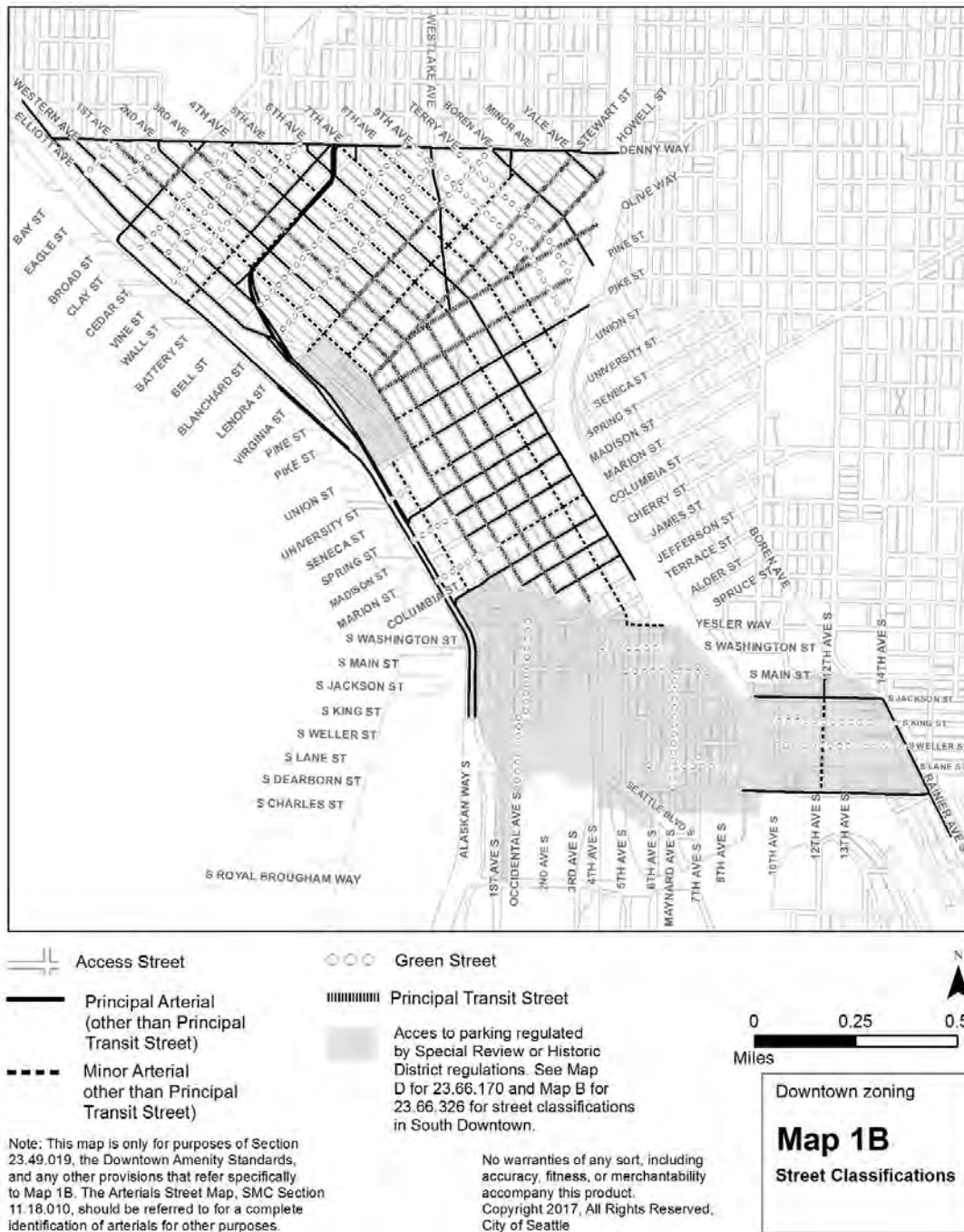
Map 1A: Downtown Zones and South Downtown Boundary

Downtown Zones and South Downtown Boundary



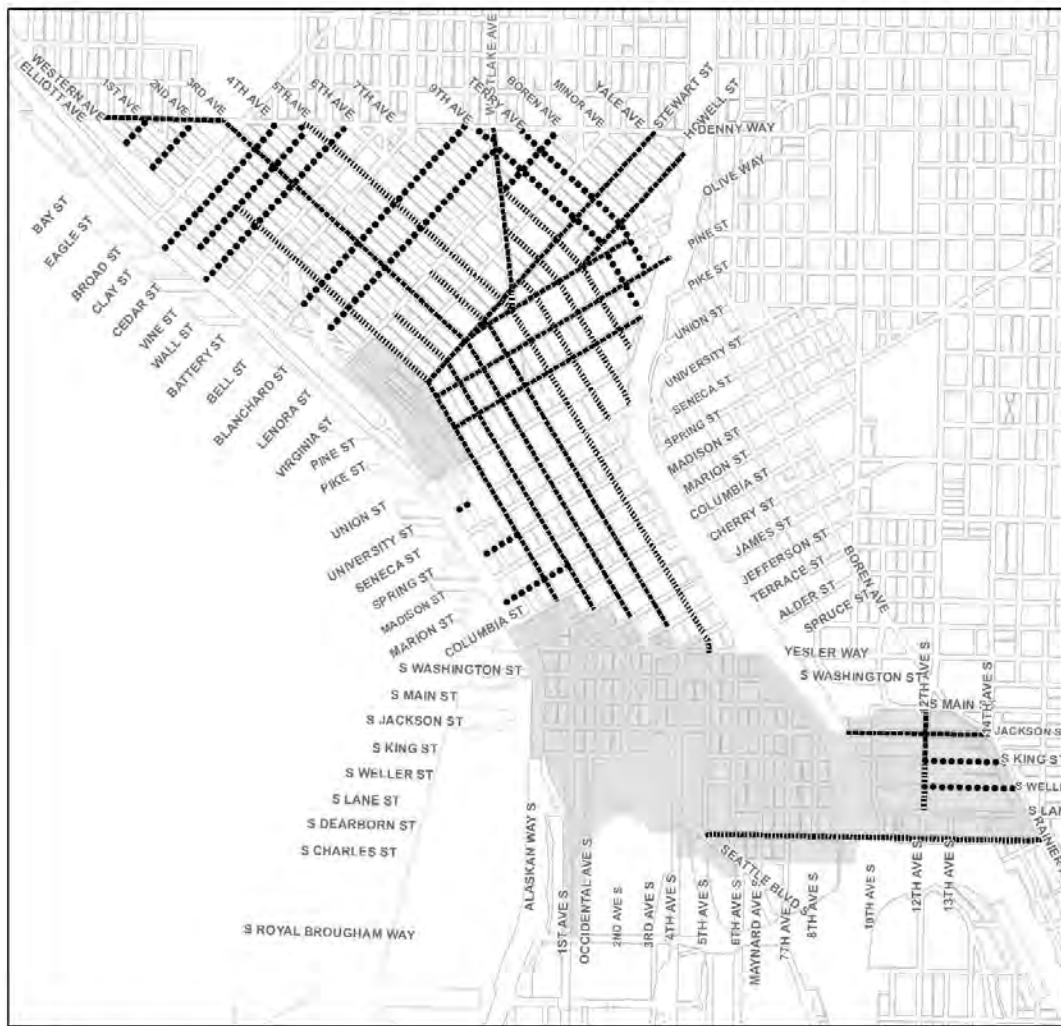
(Ord. 125291, § 27, 2017; Ord. 124680, § 11, 2015; Ord. 123589, § 53, 2011.)

Map 1B Street Classifications



(Ord. [125371](#), § 22, 2017; Ord. 123589, § 53, 2011.)

Map 1C Sidewalk Widths



- Variable
12' applies to all unmarked streets
- ||||| 15'
- 18' (when on a one-way street, only
the side with the transit stops shall be 18';
the other side shall be 15'.)
- Sidewalk widths addressed by
Special Review or Historic
District regulations



Downtown zoning

Map 1C

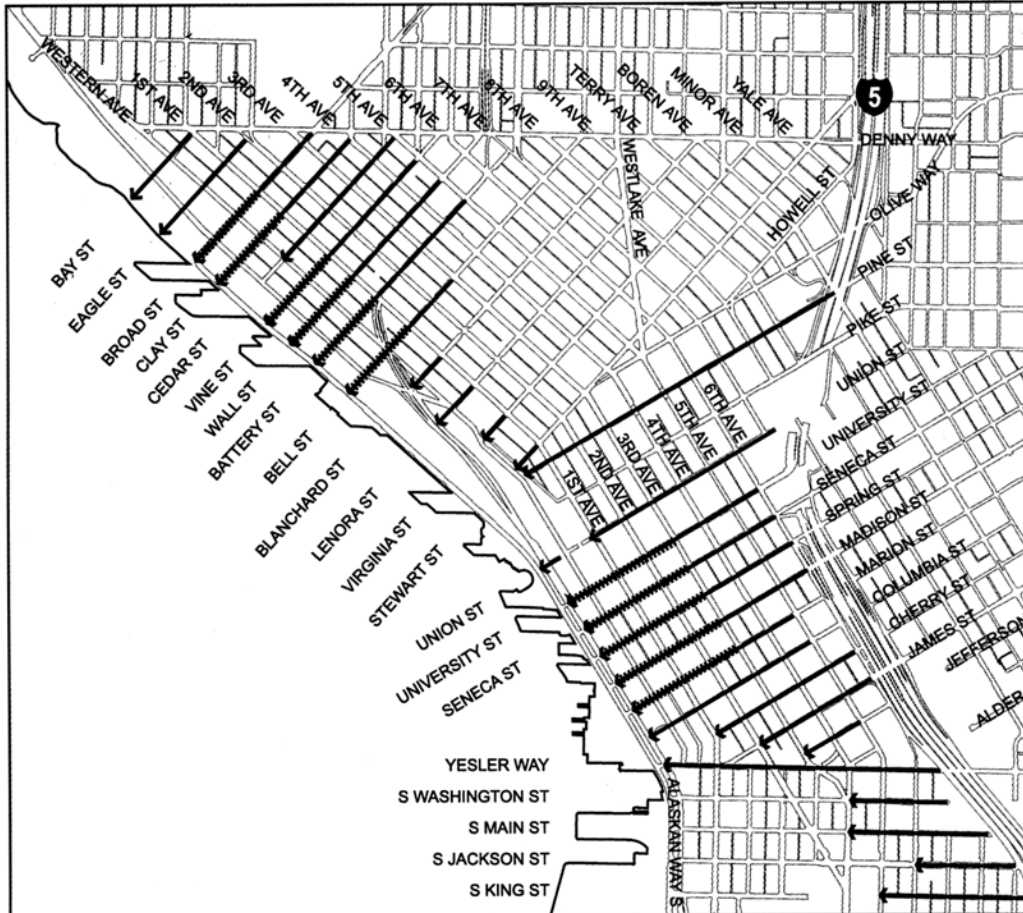
Sidewalk Widths

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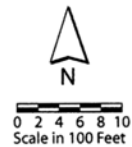
(Ord. 125371, § 22, 2017; Ord. 123589, § 53, 2011.)

Map 1D View Corridors

View Corridors



- View Corridors as established in Downtown View Corridor Map, Exhibit 3.5.C of Resolution 30297 (black line indicates extent of View Corridor)
- ▨ Portions of View Corridor requiring View Corridor setbacks according to Section 23.49.024
- ← Arrow indicates direction of View

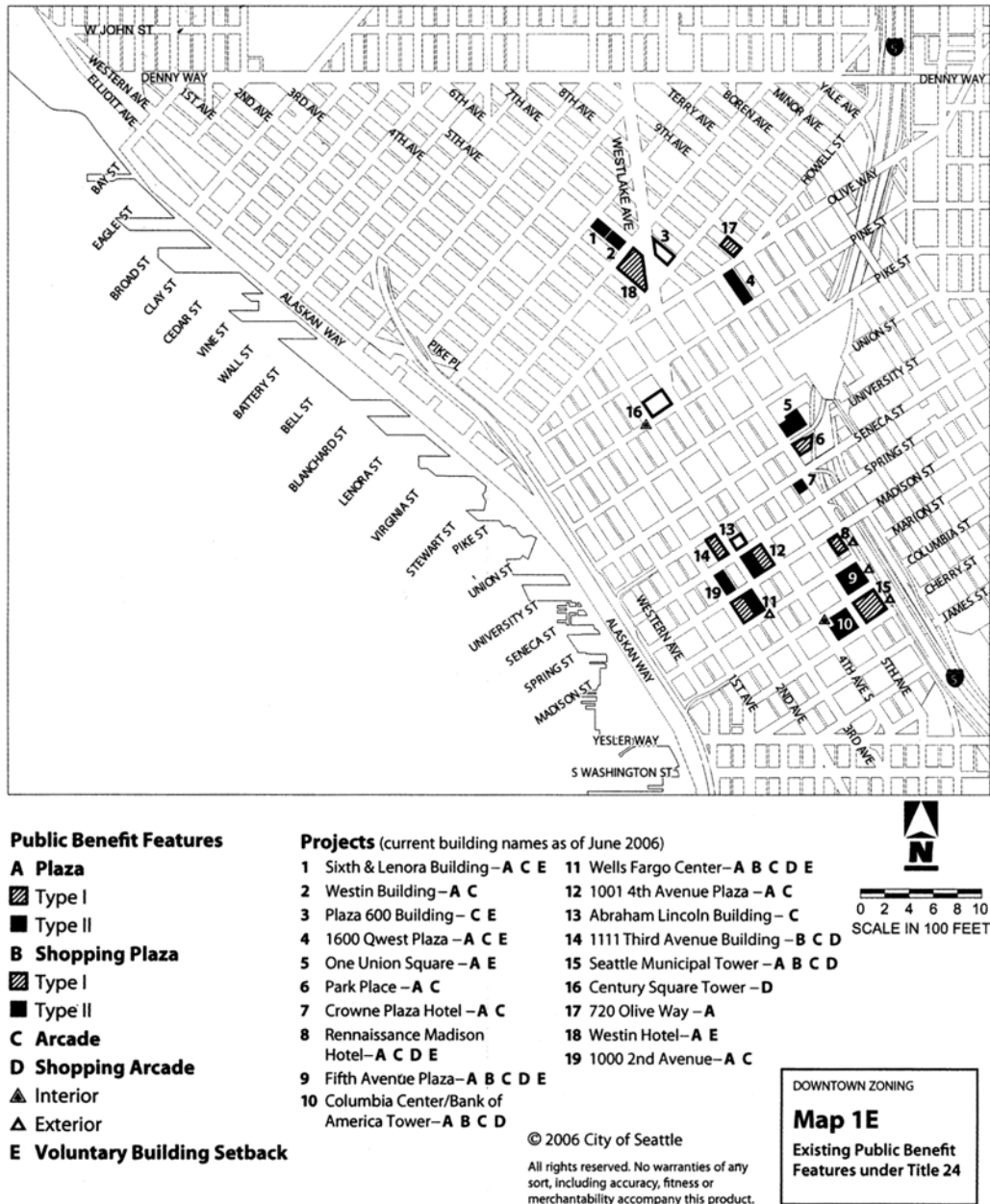


DOWNTOWN ZONING
Map 1D
View Corridors

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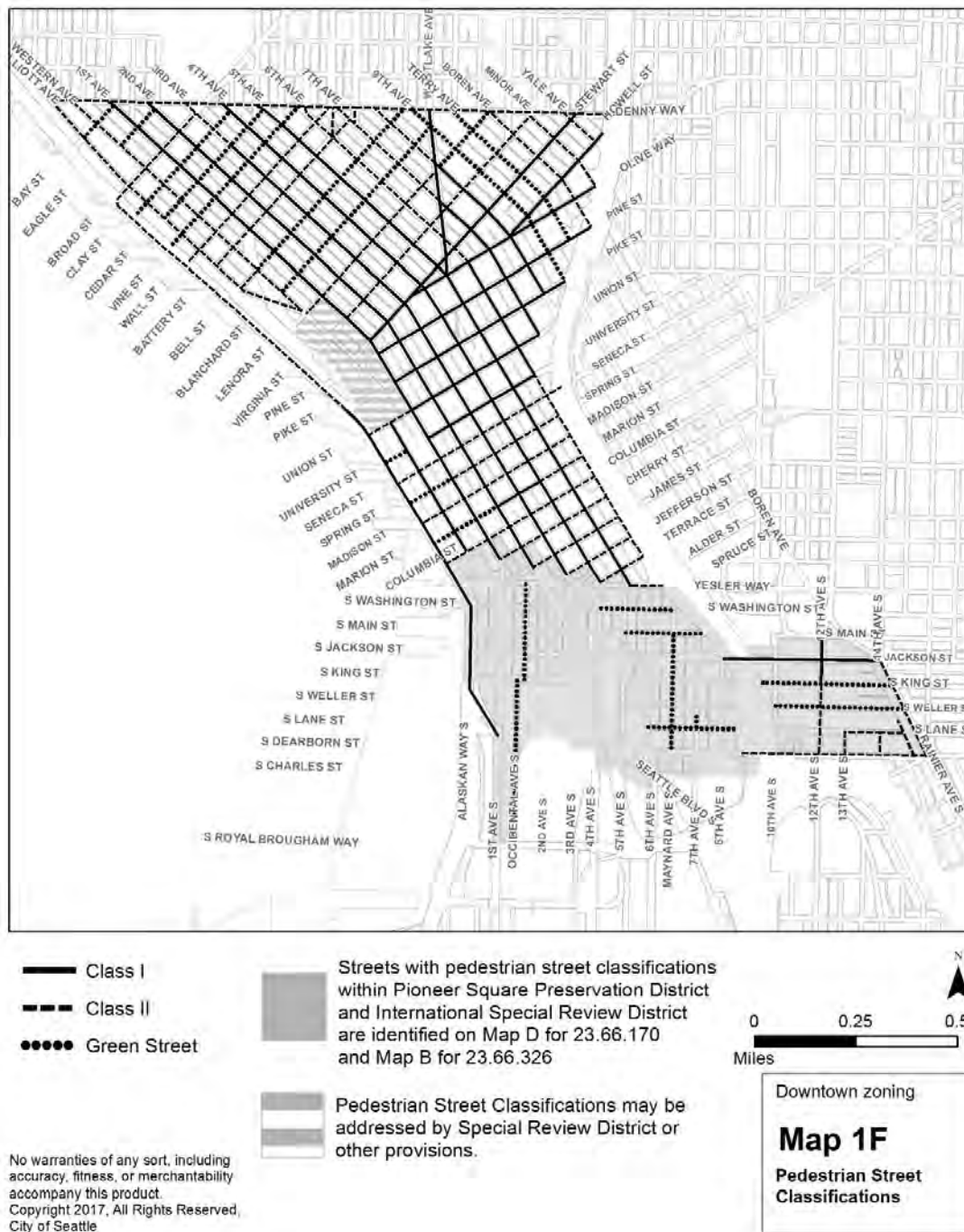
(Ord. 123589, § 53, 2011.)

Existing Public Benefit Features under Title 24



(Ord. 123589, § 53, 2011.)

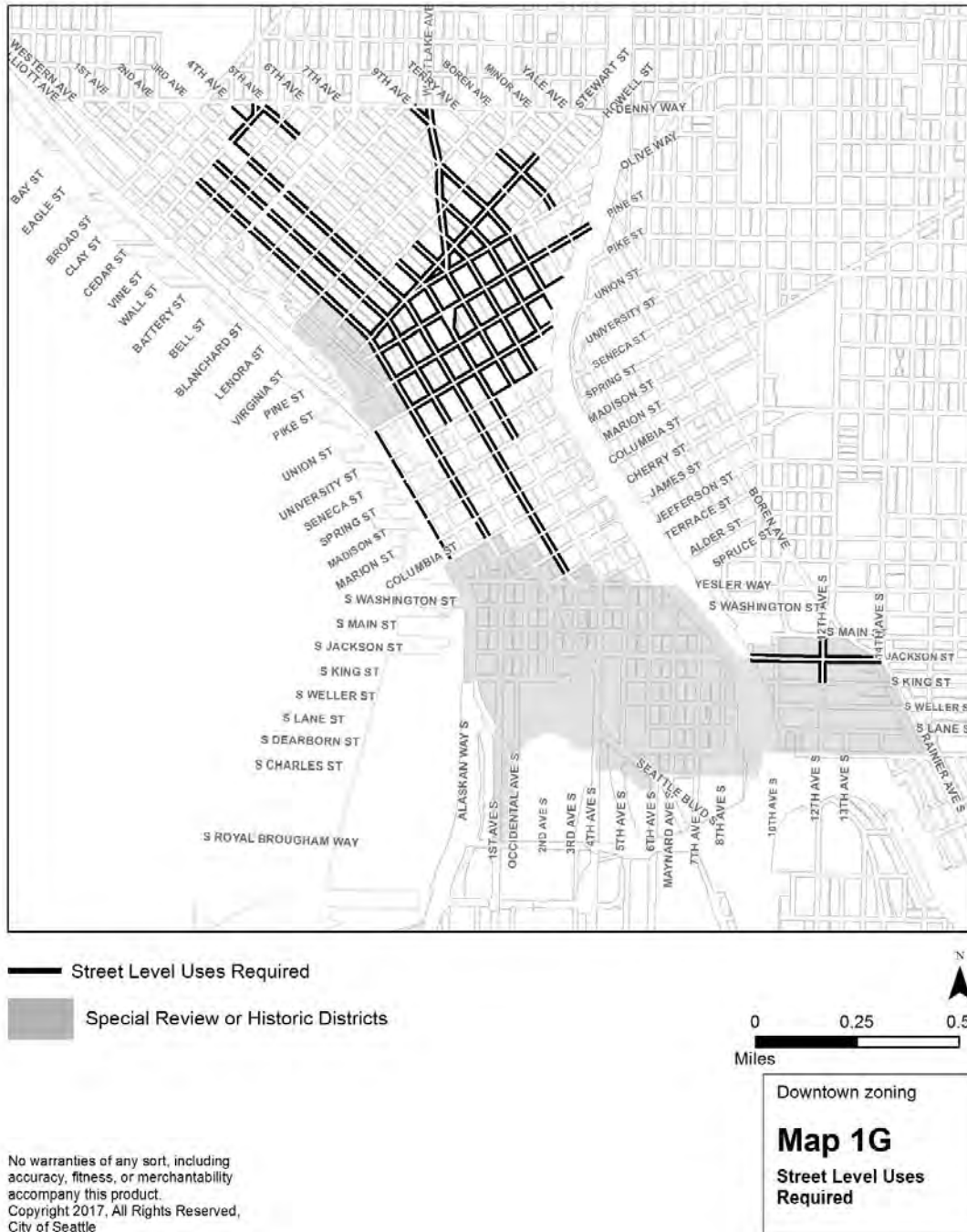
Map 1F: Pedestrian Street Classifications



(Ord. 125371, § 22, 2017; Ord. 124680, § 11, 2015; Ord. 123589, § 53, 2011.)

Map 1G: Street Level Uses Required

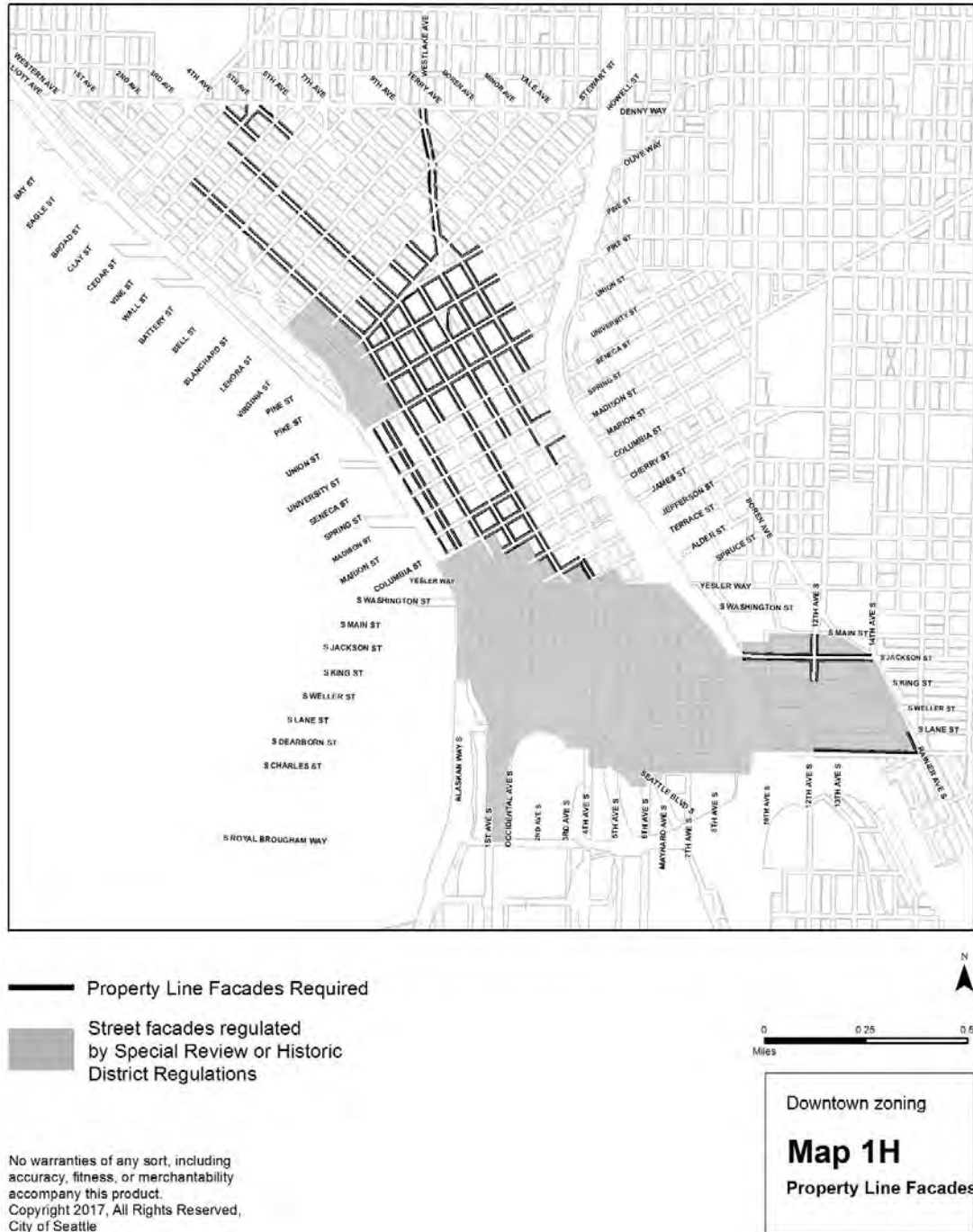
Street Level Uses Required



(Ord. 125371, § 22, 2017; Ord. 124680, § 11, 2015; Ord. 123589, § 53, 2011.)

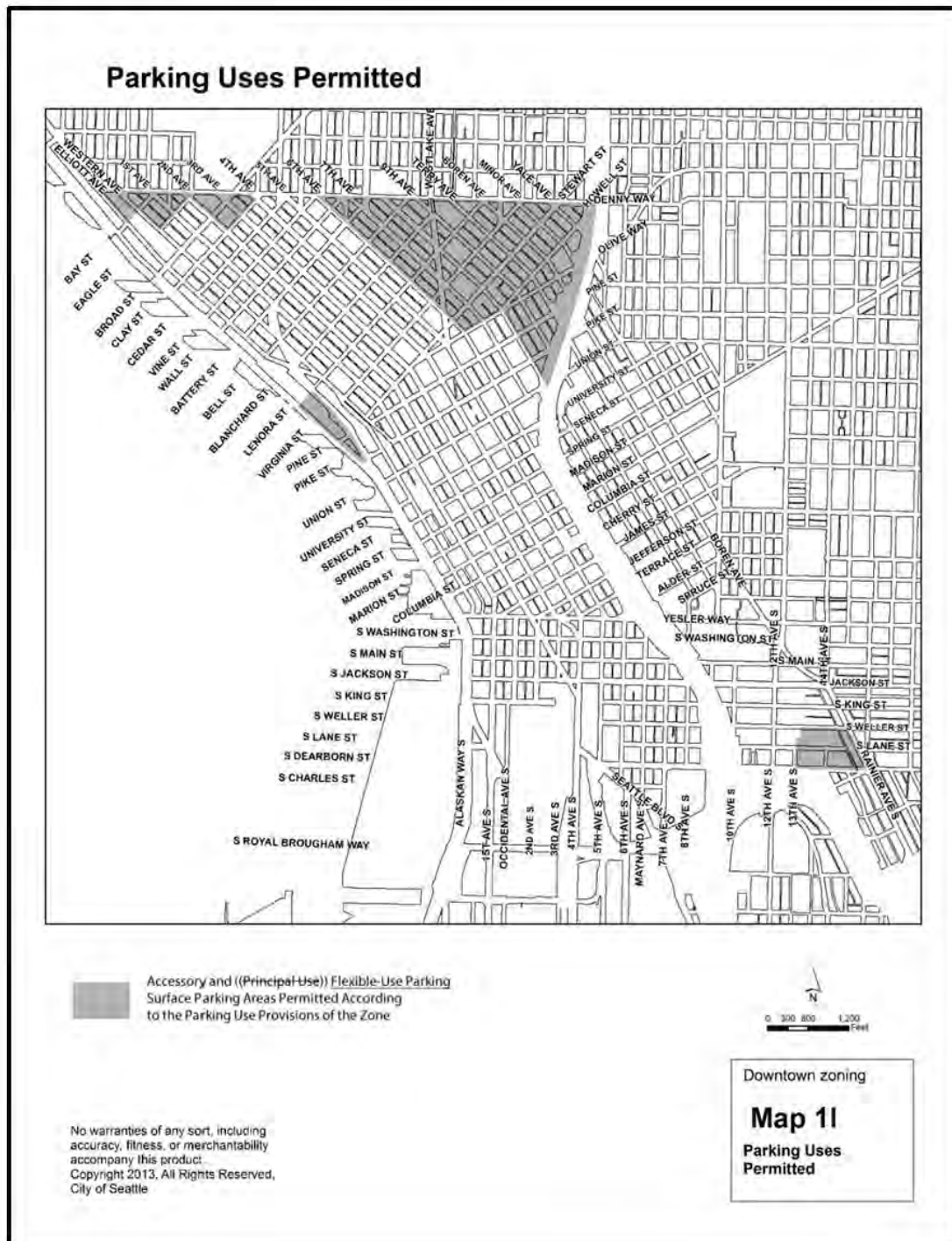
Map 1H: Property Line Facades

Property Line Facades



(Ord. 125371, § 22, 2017; Ord. 124680, § 11, 2015; Ord. 123589, § 53, 2011.)

Map 11 Parking Uses Permitted



(Ord. 125558, § 27, 2018; Ord. 124843, § 44, 2015; Ord. 123589, § 53, 2011.)

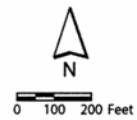
Map 1J: Public Amenity Features



(Ord. 124680, § 11, 2015; Ord. 123589, § 53, 2011.)

Map 1K Pike Place Market

Pike Place Market



-  Pike Place Market Historical District
-  Pike Market Mixed Zone

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DOWNTOWN ZONING

Map 1K

Pike Place Market

(Ord. 123589, § 53, 2011.)